INDEX

CITATIONS

Cases:

Bacigalupo v. Fleming
199 Va 827, 102 SE 2d 321

Burton v. Wilmington Parking Authority,
365 U.S. 715

Cook v. Virginia Holsum Bakeries, Incorporated
207 Va 815, 153 SE 2d 209

Jones v. Alfred H. Mayer Co.
392 U.S. 409

N.A.A.C.P. v. Alabama, 357 U.S. 449

Ocean Accident Corp. v. Haley
158 Va 691, 164 SE 538

Snead v. Commonwealth
200 Va 850, 108 SE 2d 399

Staub v. City of Baxley, 355 U.S. 313

Whitlow v. Grubb
198 Va 274, 93 SE 2d 134

STATUTORY AND CONSTITUTIONAL

Rules of Court, Supreme Court of Virginia
5:1 § 3 (f)

Civil Rights Act of 1866, 42 USC 1982

First Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 929

PAUL E. SULLIVAN, ET AL., Petitioners

v.

LITTLE HUNTING PARK, INC., ET AL.

T. R. FREEMAN, JR., ET AL., Petitioners

v.

LITTLE HUNTING PARK, INC., ET AL.

BRIEF IN OPPOSITION TO PETITION

QUESTIONS PRESENTED

The Petitioners present five questions to the Court. Actually there are two questions for consideration.

1. Whether the procedural requirements of the Supreme Court of Appeals of Virginia are a non-federal ground for its refusal to accept the remand of this Court.

2. Whether membership in a voluntary, private social club, or association is within the complete control of the club or association which can grant or refuse such membership at will.

STATEMENT OF FACTS

1. Rule 5:1 of the Rules of the Supreme Court of Appeals in reference to contents of the record of appeal provides:

> Counsel tendering the transcript or statement shall give opposing counsel *reasonable written* notice of the time and place of tendering it and a reasonable opportunity to examine the original or a true copy of it.

The notice of the tendering of the transcript to the trial judge was in the form of a letter, dated and mailed on Friday, June 9, 1967, by counsel for petitioners to the counsel for respondents stating that the transcript would be presented to the trial judge on that same day, June 9, 1967. In the usual course of mail delivery, the letter was received by counsel for respondents on Monday, June 12, 1967, three days after delivery to the trial judge. A copy of the transcript was "lent" to counsel for respondents eight days after the notice on June 16, 1967. Counsel for respondents had one working day to examine a lengthy transcript that contained numerous errors.

2. LITTLE HUNTING PARK, INC. was formed by residents of Fairfax County, Virginia in 1954 as a membership organization, financed by all those who paid an initial fee of $150.00 for a certificate of membership. The initial by-laws of the corporation have changed little during the ensuing years and provided, in addition to the membership certificate, that each application for membership be in writing and approved by the Board of Directors. The club was unique insofar as the initial payment of $150.00, or initiation fee was not forfeited when membership ceased but could be sold to another who was interested in membership. The assignee, according to the by-laws, would then apply to the Board of Directors for membership and, when accepted, pay the required dues. In the alternative, membership was often available directly from the corporation. The by-laws placed a geographical limitation on the residence of the proposed members. However, the geographical limitation was dropped and as of Freeman's application for membership, a large portion of the members were living outside the geographical limits.

In addition, the by-laws placed a limit on membership at 600 members which was a small portion of the actual residents within the geographical limits.

The initial by-laws, provided under the "purpose" clause:

> The purpose of the corporation shall be to own (or lease), construct, develop, operate, maintain and manage suitable facilities for the safe and healthful recreation *of the Corporation's members,* said facilities to include a swimming pool, a park, and such other appurtenances as the corporation may deem desirable.

Temporary assignment of the privileges of membership was permitted for a period not in excess of one year, subject to the approval of the Board.

The club constructed a swimming pool, tennis courts and conducted numerous social activities on the club property. Access to the premises of the club was controlled at the "gate" where proof of membership was required prior to admittance.

3. Pursuant to the by-laws, Dr. Freeman submitted his application in writing to the Board of Directors for approval of his temporary membership. At a regular meeting of the Board of Directors on May 18, 1965, the application of Dr. Freeman was declined. The three members of the Board who testified in the trial court stated that there was no discussion, by the Board, of Dr. Freeman's race. The application for transfer of membership does not contain any indication as to the race of the applicant.

4. When Mr. Sullivan was served notice, pursuant to the club's by-laws, that he had the right to appear before the club's Board of Directors to show cause why he should not be expelled, he commenced an action in the Circuit Court of Fairfax County for the purpose of an injunction requiring the club to change the meeting date, allow counsel of his choosing to be present and to provide him with a bill of particulars of the charges against him. By stipulation, in open court, it was agreed that the club would agree to all of the foregoing on the condition that the action of the Board of Directors, in declining the membership of Dr. Freeman would be submitted to the general membership of the club and Mr. Sullivan would abide by the decision of the general membership. At a meeting of the membership, held on the 29th day of July, 1965, the membership overwhelmingly sustained the Board of Directors. Mr.

Sullivan has since refused to abide by the stipulation filed in the Circuit Court of Fairfax County, Virginia.

5. Paul E. Sullivan was given a bill of particulars concerning his conduct which the board felt was "inimical to the corporations members". These charges consisted of harrassment, rudeness, abusive language, libel and no reference was made to the submission of Dr. Freeman for membership. Mr. Sullivan was given a hearing before the Board, the presence of an attorney of his choice and the right to bring witnesses to testify in his behalf. The learned trial judge in his opinion letter stated that "there was ample evidence to justify its conclusion that the complainant's acts were inimical to the corporation's members and to the corporation".

ARGUMENT AND AUTHORITIES

1. The Supreme Court of Appeals of Virginia has consistently held that the notice requirement of the Rule 5:1 has been mandatory.

In 1959, the case of *SNEAD v. COMMONWEALTH*, 200 Va 850, 108 SE 2d 399, was decided by that court. Counsel for Snead, convicted of larceny, tendered notice to the Commonwealth Attorney, at 7:00 P.M. in the evening, that on the same day he would submit the transcript to the trial judge. The trial judge received the transcript at 7:30 P.M. that same evening. The Court held

> The plain language of the Rule requires counsel to give opposing counsel reasonable written notice of the time and place of tendering the transcript or narrative of the evidence and to give him a reasonable opportunity to examine it. The duty rests on counsel to afford the reasonable opportunity to examine and not on the trial judge.

In *OCEAN ACCIDENT CORP. v. HALEY*, 158 Va 691, 164 SE 538, the court construed Section 6252 of the Code of Virginia 1919, which was later replaced by Rule 5:1 as follows:

> "That the provisions of the statute is mandatory, and that the notice was not reasonable within the plain meaning of its terms, which are jurisdictional".

In *COOK v. VIRGINIA HOLSUM BAKERIES, INC.*, 207 Va 815, 153 SE 2d 209, the court held that since the opposing counsel had three days notice and the narrative of evidence consisted of only 12 pages, the

notice was reasonable and would not apply the ruling of *SNEAD v. COMMONWEALTH*, supra.

BACIGALUPO v. FLEMING, 199 Va 827, 102 SE 2d 321, is distinguished from the instant case in that the prior notice was given and the transcript tendered to counsel three days prior to submission to trial judge. The trial judge allowed another five days for counsel to correct errors prior to his signing.

The present case differs from *N.A.A.C.P. v. ALABAMA*, 357 U.S. 449 and *STAUB v. CITY OF BAXLEY*, 355 U.S. 313, insofar as the Alabama Court and the Georgia Court were not consistent in their procedure rulings in the above cases and their prior decisions.

In *WHITLOW v. GRUBB*, 198 Va 274, 93 SE 2d 134, the late chief justice of the Supreme Court of Appeals of Virginia stated:

> The rules of appellate procedure are simple, brief, and expressed in unambiguous language. We have said repeatedly that compliance with them is necessary for the orderly, fair and expeditious administration of justice.

The late Justice Frankfurter dissenting in *STAUB v. CITY OF BAXLEY*, supra, stated:

> The relevance of a state procedure requiring that constitutional issues be presented in their narrowest possible scope is confirmed by the practice of this Court. The Court has long insisted, certainly in precept, on vigorous requirements that must be fulfilled before it will pass on constitutionality of legislation, on avoidance of such determination even by strained statutory construction, when unavoidable, as narrow as circumstances will permit.

2. *BURTON v. WILMINGTON PARKING AUTHORITY*, 365 U.S. 715, held that the fourteenth amendment applies to state action and erects no shield against merely private conduct however discriminatory or wrongful.

On the basis of the word "community" used in the certificate of incorporation of the respondent, and ignoring all other evidence, the petitioners contend that the respondent is a public facility. Having thus determined that the facility is public the directors are "public figures". Public figures "are part of the state". The "state" cannot deprive a man of his free speech nor can a state abridge the privileges or immunities of Citizens of the United States.

Overlooked by the petitioners are the by-laws and the actual operation of the corporation since its founding in 1954. The petitioners have acknowledged the existence of a private club by submitting, for approval, to the Board of Directors, the form required for approval of the temporary assignment of membership privileges, calling a special meeting of the membership and in all other matters prior to the commencement of their action in court.

The petitioners further contend that since the facilities are also furnished in some areas by the state, hence the facilities of the respondent are public. We would be hard pressed today to find any activity that is strictly limited to the non-public sector with the possible exception of religion. In the recreation field, there are private golf courses and public ones, public tennis courts and private, public and private swimming, bridge, boating, and other social gatherings. The mere fact that a governing body sees fit to provide a means for the populace to use its leisure hours does not pre-empt the

individual from selecting a non-public way of using his free time.

To further strengthen their conclusion that the first and fourteenth amendments apply to the respondents, they contend that the state courts, an admitted arm of the state, gave validity to racial discrimination by ruling on the basis of evidence that the respondents were a social club. It must be remembered that in the trial court, the petitioners were the complainants and the respondents were the defendants. The respondents did not request the court to enforce a restrictive covenant.

Neither the court nor the respondents curtailed Mr. Sullivan's right to free speech. The respondents exercised their ante-constitutional right of freedom of association and elected to refrain from social contact with him because of his conduct. In the guise of free speech does anyone have the right to be antagonistic to and disruptive of this honorable court and still remain in its good graces? Or does the court reserve for itself something that is not available to the citizenry as a whole?

3. In *JONES v. ALFRED H. MAYER CO.*, 392 U.S. 409, the court stated:

> We hold that § 1982 was intended to bar all racial discrimination, private as well as public, in the sale or rental of property, and the statute was a valid exercise of the power of Congress to enforce the Thirteenth Amendment.

Justice Stewart, in the majority opinion stated:

> At the offset, it is important to make clear precisely what this case does not involve. . . . It does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwell-

ing. . . . And although it can be enforced by injunction, it contains no provision expressly authorizing a federal court to order the payment of damages.

The contention of the petitioners is that since the lease between the petitioners Sullivan and Freeman contained a clause transferring membership privileges in the club, the lease comes under 42 USC § 1982 and the interpretation thereof by *JONES v. ALFRED H. MAYER CO.*, supra. The respondents were not parties to the lease and not in privity with the parties thereto. The petitioner, Sullivan, could contract away only that which he possessed and by the subsequent actions of the petitioners, they acknowledged that the transfer of the privileges of membership was subject to the approval of the Board of Directors of the club.

§ 1982 states that all citizens of the United States shall have the same right, in every State and Territory, "as is enjoyed by white citizens thereof . . . " . Under the petitioners' interpretation of this paragraph, since it applies only to race or color, a Negro could have a right superior to white citizens for § 1982 would not guarantee membership in a club to a white person. It would then follow that a Negro would be entitled to membership on the basis of his race alone whereas white persons would be subject to acceptance or non-acceptance on other grounds.

When denying membership or membership privileges in a club or association, the board of directors or other group of members who are empowered with making this decision must refrain from specifying the reason for such non-acceptance or be ready to face a defamation suit from each prospective member that is refused. If the applicant is of the Negro race, and the petitioners'

contention is valid, the membership determination bod must decide on the frying pan or the fire, by facing defamation suit in revealing its reason for denial or suit under § 1982.

The Board of Directors of LITTLE HUNTING PARK, INC. did not, from the evidence of the three board members who testified in the trial court, discuss the race of the applicant, Freeman. However, they are adjudged guilty of discrimination on the basis of race strictly on the basis that Dr. Freeman is of the Negro race.

Dr. Freeman is now in Pakistan and the specific relief requested on his behalf is one of damages. Should the court rule that § 1982 applies in his case, would that paragraph entitle him to damages in view of the holding in *JONES v. ALFRED H. MAYER CO.*, supra, to the extent that that decision "does not authorize a federal court to order the payment of damages"?

Mr. Sullivan is white and possesses all the rights "as is enjoyed by white citizens".

CONCLUSION

On the basis of the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN CHAS. HARRIS
1500 Belle View Boulevard
Alexandria, Virginia 22307
Attorney for Respondents